

BEFORE THE
Federal Communications Commission
Washington, DC 20554

ORIGINAL

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JUN 19 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re applications of

DARRELL BRYAN

SBH PROPERTIES, INC.

For a Construction Permit
for a New FM Station on
Channel 276A (107.3 MHz)
in Tusculum, Tennessee

) MM Docket No. 93-241

) File No. BPH-920109MA

) File No. BPH-920123MD

) DOCKET FILE COPY ORIGINAL

To: Honorable John M. Frysiak
Administrative Law Judge

JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT

Darrell Bryan ("Bryan"), and SBH Properties, Inc. ("SBH"), by their respective attorneys and pursuant to Section 72.3525 of the Commission's Rules, hereby respectfully move the Presiding Judge in the event Bryan is determined to be financially qualified, to approve the attached Settlement Agreement between Bryan and SBH and the Consulting Agreement between Bryan and William Seaver, to dismiss with prejudice the SBH application, to grant the above-captioned application of Bryan, and to terminate this proceeding. Resolution of financial issues added against Bryan by the presiding Judge is still pending. A hearing on the issues was held on July 26, 1994 and proposed and reply findings and conclusions were submitted by the parties. The issues will have to be resolved favorably to Bryan in order for the settlement to be approved and the Bryan application granted. If the issues are resolved adversely to Bryan, the Settlement

Agreement by its terms will become void. In support of this Joint Request for Approval of Settlement Agreement ("Joint Request"), Bryan and SBH respectfully submit the following:

1. This proceeding is currently subject to the "Freeze" on comparative hearings following the Commission's Public Notice of February 25, 1994 entitled "FCC Freezes Comparative Proceedings," 9 FCC Rcd 1055. In imposing the freeze, the Commission encouraged all parties having mutually-exclusive applications to attempt to reach agreements that would remove the mutual exclusivity among and between their applications.

2. Agreement Between Bryan and SBH, Appendix A to this Joint Request is a true, correct, and complete copy of the Settlement Agreement that was made and entered into by and between Bryan and SBH as of June 16, 1995. In pertinent part, the Agreement between Bryan and SBH contemplates that SBH will dismiss its application in File No. BPH-920123MD, in consideration for the payment to SBH by Bryan of Ninety Thousand Dollars (\$90,000.000) representing the reasonable and prudent expenses of SBH in prosecuting its application.

3. Consulting Agreement Between Bryan and William Seaver, Appendix B to this Joint Request is a true, correct, and complete copy of the Consulting Agreement that was made and entered into by and between Bryan and William Seaver as of June 16, 1995. As shown above, Bryan will reimburse SBH for its reasonable and prudent expenses incurred in connection with the prosecution of its application. In addition, the Bryan and Seaver have entered into a consulting agreement under which Seaver agrees to provide the benefit of his expertise and not to compete with the proposed Bryan station in Greene County, Tennessee. Under the agreement, Bryan will pay the sum of \$30,000 per year for two years for a total of \$60,000. The consulting agreement accords fully with Commission precedent as does the noncompetition covenant in that

the covenant is reasonably limited in geographic scope and duration.

4. Appendix C to this Joint Request is the Declaration of Darrell Bryan which states under penalty of perjury that he did not file his application in File No. BPH-920109MA for the purpose of reaching the Agreement with SBH or any similar agreement. Bryan's Declaration further states that apart from the consideration that is to be paid to SBH pursuant to the Agreement, Bryan has neither paid, nor agreed to pay, nor promised to pay, nor otherwise committed himself to pay, any other consideration in order to procure the voluntary dismissal of SBH's application. Bryan acknowledges that he has required that SBH's president, William Seaver enter into a consulting agreement. Mr. Seaver, who is an experienced broadcaster has recent experience in the Johnson City market which will receive service from the proposed FM station. The agreement includes a noncompetition covenant which protects Bryan in Greene County, Tennessee, from competition from Seaver for a period of five years. Bryan's Declaration further states that approval by the Commission of the Agreement between Bryan and SBH will serve the public interest by enabling the Commission to terminate this proceeding in a manner that will expedite the inauguration of new FM radio broadcast service to Tusculum and environs and that will spare the resources of the Commission and the parties to this proceeding from being spent on further litigation.

5. Appendix D to this Joint Request is the Declaration of William Seaver of SBH in which he states under penalty of perjury that SBH did not file its application for the purpose of entering into an agreement with Bryan. Seaver's Declaration further states that no consideration of any kind has been promised or paid, directly or indirectly, by Bryan for the dismissal of the SBH application, except as set forth in the Agreement between Bryan and SBH. Mr. Seaver

acknowledges that he has agreed to a separate consulting agreement. Finally, Seaver's Declaration states that approval of the Agreement between Bryan and SBH will eliminate the need for Commission review in this proceeding and will speed the institution of new service to the Tusculum area. For that reason, Seaver states in his Declaration, the Agreement should be approved. In his Declaration, Seaver states under penalty of perjury that SBH incurred expenses in excess of Ninety Thousand Dollars (\$90,000.00) in connection with the preparation, filing, and prosecution of SBH's application.

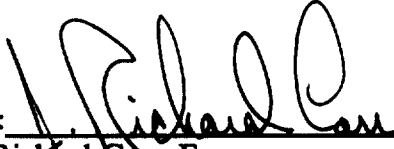
6. This Joint Request and its Appendices demonstrate compliance by the parties with Section 73.3525 of the Commission's Rules. Contingent upon a determination that Bryan is financially qualified, the Commission's (i) grant of this Joint Request, (II) approval of the Agreement between Bryan and SBH,, (III) dismissal with prejudice of the application of SBH, and (IV) grant of the application of Bryan are respectfully requested.

Respectfully submitted,

SBH PROPERTIES, INC.

By: _____
Timothy K. Brady, Esq.
P.O. Box 986
Brentwood, TN 37024
(615) 371 9367

DARRELL BRYAN

By:  _____
J. Richard Carr, Esq.
P.O. Box 70725
Chevy Chase, MD 20813-0725
(301) 656-7053

June 19, 1995

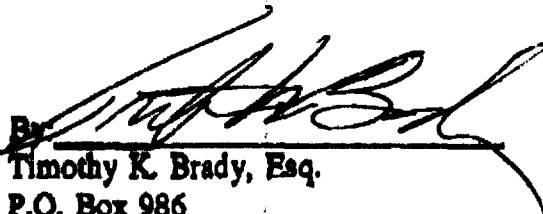
acknowledges that he has agreed to a separate consulting agreement. Finally, Scaver's Declaration states that approval of the Agreement between Bryan and SBH will eliminate the need for Commission review in this proceeding and will speed the institution of new service to the Tusculum area. For that reason, Scaver states in his Declaration, the Agreement should be approved. In his Declaration, Scaver states under penalty of perjury that SBH incurred expenses in excess of Ninety Thousand Dollars (\$90,000.00) in connection with the preparation, filing, and prosecution of SBH's application.

6. This Joint Request and its Appendices demonstrate compliance by the parties with Section 73.3525 of the Commission's Rules. Contingent upon a determination that Bryan is financially qualified, the Commission's (i) grant of this Joint Request, (II) approval of the Agreement between Bryan and SBH, (III) dismissal with prejudice of the application of SBH, and (IV) grant of the application of Bryan are respectfully requested.

Respectfully submitted,

SBH PROPERTIES, INC.

DARRELL BRYAN

By: 
Timothy K. Brady, Esq.
P.O. Box 986
Brentwood, TN 37024
(615) 371 9367

By: _____
J. Richard Carr, Esq.
P.O. Box 70725
Chevy Chase, MD 20813-0725
(301) 656-7053

June ____, 1995

ATTACHMENT A

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into as of the date last set forth below between DARRELL BRYAN ("Bryan"), an individual resident in Greenville, Tennessee, and SBH PROPERTIES, INC. ("SBH"), a corporation organized under the laws of the State of Tennessee (collectively referred to as "the Parties") .

W I T N E S S E T H:

WHEREAS, on January 9, 1992, Bryan filed with the Federal Communications Commission ("the FCC") an application (FCC File No. BPH-920109MA) requesting a construction permit to build a new Class A FM radio Broadcast station to operate on Channel 276A in Tusculum, Tennessee; and

WHEREAS, on January 23, 1992, SBH filed with the FCC an application (FCC File No. BPH-920123MD) requesting a construction permit to build a new Class A FM radio Broadcast station to operate on Channel 276A in Tusculum, Tennessee; and

WHEREAS, Bryan and SBH (the "Applicants") have been prosecuting their mutually exclusive applications before the FCC since January 1992, which applications were designated for comparative hearing in MM Docket No. 93-241; and

WHEREAS, by Memorandum Opinion and Order (FCC 94M-296), released April 25, 1994, financial and related issues were added against Bryan, which issues were subsequently tried and with respect to which issues Proposed and Reply Findings have been filed by both parties; and

WHEREAS, on February 24, 1994 (Public Notice 94-41) the FCC imposed a so-called "Freeze" holding in abeyance the adjudication of comparative hearings; and

WHEREAS, the Freeze has been in place for more than a year and may be of a substantial, though currently unknown, duration; and

WHEREAS, in imposing the Freeze, the FCC simultaneously encouraged all parties having mutually-exclusive applications to attempt to reach agreements that would remove the mutual exclusivity among and between their applications; and

WHEREAS, the Parties believe that in the event the financial issues are resolved in Bryan's favor, the public interest would be served by settling and terminating the conflict between them, thereby permitting the prompt institution of a new FM broadcast service at Tusculum, Tennessee; and

WHEREAS, the obligations of the parties hereunder are subject to the prior approval of the Commission:

NOW, THEREFORE, in consideration of the mutual promises herein contained, the Parties agree as follows:

1. Joint Request. The Applicants will file a Joint Request for Approval of Settlement Agreement ("Joint Request") with the Commission, conditioned upon a finding that Bryan is financially qualified, pursuant to Section 73.3525 of the Commission's Rules, seeking the following actions by the Commission:

- (a) approval of this Settlement Agreement;
- (b) approval of the consulting agreement between Bryan and William Seaver;
- (c) dismissal of SBH's application with prejudice; and
- (d) grant of the Bryan application.

all of which actions shall be deemed mutually contingent.

2. No Adverse Actions. Consistent with the provisions of this agreement, the Parties agree to take no action adverse to this Settlement Agreement, the Joint Request, the grant of the Bryan application, and the dismissal of the SBH application.

3.1 Financial Qualifications. This Settlement Agreement is and action requested in the Joint Request shall be made contingent on resolution of the pending financial issues by the Presiding Judge in Bryan's favor. In the event the financial and related issues are resolved adversely to Bryan, this Agreement shall be null and void.

4. Payment. Bryan agrees to pay to SBH as consideration for the foregoing and for the performance of the obligations of SBH hereunder, the amount of NINETY THOUSAND DOLLARS (\$90,000.00) for the reimbursement of SBH's legitimate and prudent expenses incurred in the preparation, filing, and prosecution of its application (Settlement Price"). The payment of the Settlement Price to SBH is expressly conditioned upon the approval of this agreement, dismissal with prejudice of the SBH application, the grant of Bryan's application, and each those actions having become final [*i.e.*, granted by an Order (or Orders) which is not reversed, stayed, set aside, enjoined or suspended and with respect to which no requests for administrative or judicial review or stay are pending, and as to which the time for filing such a petition or appeal, or for the FCC to set aside its consent on its own motion, has expired].

5. Consulting agreement. This Settlement Agreement is also conditioned upon FCC approval of the Consulting Agreement between Bryan and William Seaver which is being executed this same date.

6. Method of Payment. The Settlement Price shall be paid within five days after the date the Order (or Orders) referenced in Paragraph 3 above becomes final, as defined in Paragraph

3 above. Payment shall be made by wire transfer to the Client Trust Account of SBH's counsel, Timothy K. Brady, which is located at First Tennessee Bank, Franklin, Tennessee, pursuant to wire instructions to be provided by SBH's counsel.

7. Letter of Credit. No later than five (5) days after the filing of the Joint Request, Bryan will obtain and deliver to SBH or its counsel an irrevocable Letter of Credit from Greene County Bank in the amount of \$150,000.00 and pursuant to which the bank shall guarantee the payments due SBH under this Agreement and the payments due Seaver under the Consulting Agreement. The Parties agree that if Bryan fails to obtain the Letter of Credit in the accordance with the foregoing, SBH may terminate this Settlement Agreement, withdraw from the Joint Request and continue to prosecute its application.

8. Required Filings. This Settlement Agreement is entered into subject to approval by the Commission. The Parties shall file with the Joint Request a copy of this Settlement Agreement, together with all supporting documentation required by Section 73.3525 of the Commission's Rules, including a showing by SBH that the Settlement Price does not exceed its legitimate and prudent out-of-pocket expenses incurred in the preparation and prosecution of its application.

9. Cooperation. The Parties agree to cooperate with each other and with the Commission by expeditiously providing to one another or to the Commission, all additional information that may be reasonably required, and by expeditiously filing the additional documents that may be necessary or appropriate to comply with Section 73.3525 of the Commission's Rules, to effectuate the objectives of this Settlement Agreement, or to satisfy the conditions to settlement. The Parties agree to provide the Commission with such information requested by the Commission

within seven (7) days after each such request.

10. Scope and Binding Effect. This Settlement Agreement is the only agreement between SBH and Bryan and contains all of the terms and conditions agreed upon with respect to the subject matter hereof, and cannot be amended or modified except by an instrument in writing signed by all Parties. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties hereto, their successors, assigns, heirs or legal representatives. Each Party shall bear its own expenses for the preparation of this Settlement Agreement and supporting documents.

11. Counterparts. The Parties agree that this Settlement Agreement may be executed in counterparts, all of which together, so executed, shall constitute one and the same instrument.

12. Governing Law. This Settlement Agreement shall be construed under the laws of the State of Tennessee, the Communications Act of 1934, as amended, and the rules and regulations of the Commission.

13. Execution. Each Party hereto expressly warrants that it has the full power and authority to enter into this Settlement Agreement and to execute the same, and that there is no constraint upon such Party's legal ability to perform its responsibilities hereunder.

14. Specific Performance/Costs of Enforcement. In the event of a breach of this Settlement Agreement by SBH, then Bryan shall be entitled to secure specific performance of the Settlement Agreement, it being recognized by the Parties that any legal remedy or remedies that otherwise might be available would not be adequate to cure or compensate for such breach of this Settlement Agreement. If, on account of an alleged breach or default by any Party of its obligations under this Settlement Agreement, any other Party shall employ an attorney to enforce

or defend any of its rights or remedies under this Settlement Agreement, the prevailing party shall be entitled to recover its reasonable costs incurred in such connection, including but not limited to reasonable attorneys' fees.

IN WITNESS WHEREOF, the Parties have affixed their signatures to this Settlement Agreement on the dates set forth below, contemplating the effective date hereof to be the date last set forth below.

SBH PROPERTIES, INC.

By: William Seaver
William Seaver, President
6/16/95

DARRELL BRYAN

By: Darrell Bryan
Darrell Bryan
6-16-95

ATTACHMENT B

CONSULTING AGREEMENT

This agreement, entered into this 16 day of June, 1995, by and between William Seaver ("Seaver") and Darrell Bryan ("Bryan").

W I T N E S S E T H:

WHEREAS, Bryan is an applicant (File No. BPH-920109MA) before the Federal Communications Commission ("FCC") for a construction permit for a new FM Broadcast Station on Channel 267A at Tusculum, Tennessee, which application is mutually exclusive with that of SBH Properties, Inc. ("SBH") (File No. BPH-920123MD) for the same facilities, which applications have been designated for hearing in MM Docket No. 93-241; and

WHEREAS, upon approval of the Settlement Agreement, executed this date, between Bryan and SBH and the dismissal of SBH's application pursuant to the terms of the Settlement Agreement, Bryan's application will be the sole remaining applicant and can be granted; and

WHEREAS, Seaver is a native and current resident of the proposed service area and a former resident of the proposed community of license; has over 20 years of experience in broadcast operations, management, programming and sales, including experience with stations located within the Johnson City, Tennessee radio market, which the new FM station will serve and from which Bryan intends to derive revenue; has experience in the construction and start-up of FM broadcast stations; and has,

based on his residence and experience, gained extensive and valuable knowlege with respect to the sucessful operation of FM radio stations, including experience in the market which the new FM station will serve; and

WHEREAS, Bryan wishes to obtain the benefit of Seaver's knowledge of the market and experience in FM broadcast management, programming and sales, especially with regard to effective competition in larger markets generally and with particular reference to the Johnson City radio market, to benefit the operation of the new FM station at Tusculum, Tennessee, and Seaver is willing to provide Bryan with the benefit of his knowledge and experience on a consulting basis; and

WHEREAS, Bryan wishes to obtain the benefit of Seaver's covenant not to compete during the term of this Agreement and Seaver is willing to so covenant.

NOW, THEREFORE, the parties hereto agree as follows:

1. Term of Agreement. The term of this agreement shall be for two (2) years, commencing on the day upon which the grant of Bryan's above referenced application for construction permit for a new FM Broadcast Station at Tusculum, Tennessee, becomes final and no longer subject to administrative or judicial action, review, rehearing, or appeal ("the date of finality"), and ending on the second anniversary of the date of finality.

2. Duties. Seaver shall provide such consulation and advice as may be requested by Bryan for the benefit of the new FM station, based upon Seaver's knowledge and experience in the

construction, management and operation of FM radio stations; his knowledge of the needs and interests of the communities located within the service area; his knowledge and experience in the development of station policies, management objectives and practices, sales objectives and practices, employment practices and programming; his knowledge and experience in dealing with regional advertising agencies and the development^{of} regional advertising clients and his knowledge and experience in the recruitment and development of prospective clients and employees. Seaver shall be available to Bryan on an on-call basis, during regular business hours, for consultation by telephone and shall be available for on-site consultation upon reasonable advance notice at times mutually convenient to both parties. Seaver shall be required to devote a minimum of 400 hours and a maximum of 800 hours during the term of this Agreement to providing the services set forth herein, provided that he shall not be required to devote more than 87 hours in any given month.

3. Compensation. Seaver shall receive an annual retainer of \$ 30,000.00 in exchange for the services he will provide under the terms of this agreement. He will be entitled to the the same fee, regardless of the number of hours that may be required to complete the services he is requested to provide hereunder. Additionally, he shall receive reimbursement for any "out-of-pocket" expenses (such as travel, long distance telephone, courier services, etc.) that he shall incur in the performance of his duties. Seaver shall be paid the \$ 30,000.00

retainer for the intial year of the term within 10 days of the date of finality, and, thereafter, shall be paid the \$ 30,000.00 retainer for the second year of the term within 10 days of the first anniversary of the date of finality.

4. Non-Competition. During the term of this Agreement Seaver covenants that he will not acquire any ownership interest, voting or non-voting, in any AM or FM broadcast station licensed to any community located within Greene County, Tennessee.

5. Personal Services Agreement. This agreement is deemed to be a personal services agreement between Bryan and Seaver.

6. Notice. Written notice to the parties to this agreement shall be sent by either first class mail, overnight mail or Federal Express to the following addresses and shall be effective upon receipt:

Darrell Bryan
1204 Christy Court
Greeneville, TN 37743

William Seaver
3815 Old Jonesborough Road
Jonesborough, TN 37659-5718

7. Entirety of Agreement; Enforceability; Costs. This Agreement supersedes any previous agreements between the parties. This agreement reflects the entire understanding and agreement of the parties and may not be changed or altered in any way except by means of a writing signed by both parties. The enforceability of this agreement is subject to the Rules and Regulations of the

Federal Communications Commission and it is understood that this agreement will be submitted to the Commission for its approval. This agreement is to be governed by Tennessee law to the extent it is not covered by the Rules and Regulations of the Federal Communications Commission and/or the Federal Communications Act of 1934, as amended, and the forum for any disputes hereunder shall be a state court of competent jurisdiction in Tennessee. In the event that legal action by either party is necessary to enforce its rights hereunder, such party in addition to such relief as may be granted shall be entitled to recover the costs of such action, including reasonable attorney's fees.

8. This Agreement may be signed in multiple original counterparts, each of which shall be deemed an original.

In witness whereof, the parties have executed this Agreement on the date first above written.



DARRELL BRYAN

ATTEST:





WILLIAM SEAVER

ATTEST:



ATTACHMENT C

DECLARATION

I, Darrell Bryan, hereby declare the following under penalty of perjury:

1. I am an individual applicant for a new FM station at Tusculum, Tennessee (FCC File No. BPH-920109MA).

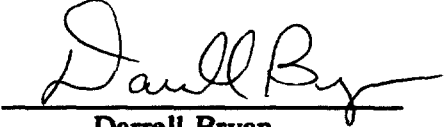
2. I have entered into a Settlement Agreement with SBH Properties, Inc. ("SBH") to remove a conflict among applications pending before the FCC in MM Docket No. 93-241. Under that agreement SBH has agreed to dismiss its application.

3. I believe that approval of this settlement will be in the public interest because it will result in a resolution of this lengthy proceeding, conserve the Commission's resources, and permit prompt initiation of service in Tusculum.

4. No consideration of any kind has been promised or paid, directly or indirectly, by me for dismissal of the SBH application except as is set forth in the settlement Agreement.

5. Since SBH principal William Seaver is a broadcaster with over twenty years experience including construction and start-up of FM broadcast stations, and recent experience in the Johnson City, Tennessee market which will be served by the proposed FM station, the Settlement Agreement is contingent upon Seaver entering into a consulting agreement with me which will include a covenant not to compete with the proposed station by acquiring any interest in a radio station licensed to any community in Greene County, Tennessee.

6. My application was not filed for the purpose of obtaining or entering into a settlement agreement with SBH or any other party or entity.


Darrell Bryan

Dated: June 16th, 1995

ATTACHMENT D
(To Be Supplied)

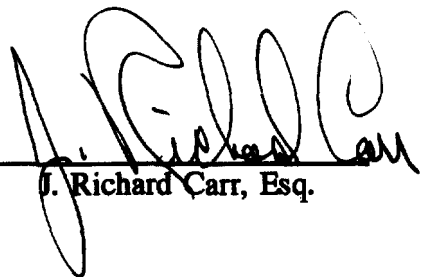
CERTIFICATE OF SERVICE

I, J. Richard Carr, hereby certify that copies of the foregoing "JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT" were sent via first class mail, postage prepaid, or as otherwise indicated, to each of the following on this 19TH of JUNE 1995:

The Hon. John M. Frysiak
Administrative Law Judge
Federal Communications Commission
2000 L Street, NW
Room 223
Washington, DC 20554

Timothy K. Brady, Esq.
P.O. Box 986
Brentwood, TN 37024
Counsel to SBH Properties, Inc.

Robert Zauner, Esq.
Hearing Branch
Enforcement Division
Federal Communications Commission
2025 M Street, NW
Suite 7212
Washington, DC 20554



J. Richard Carr, Esq.